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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA – SAN JOSE

NICOLE SANDOVAL, an individual,

Plaintiff,

vs.

OCWEN LOAN SERVICING, LLC, a
Delaware Limited Liability Company,
POWER DEFAULT SERVICES, INC.,
a Delaware Corporation, AND DOES 1
through 10, inclusive,

Defendants.

CASE NO: 13-04817

Hon. Paul Singh Grewal

**DEFENDANTS NOTICE OF
MOTION AND MOTION TO
DISMISS; MEMORANDUM OF
POINTS AND AUTHORITIES**

[Fed. R. Civ. P. 12(b)]

*[Filed concurrently with Request for
Judicial Notice]*

Date: January 14, 2014

Time: 10:00 a.m.

Courtroom: 5

**TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF
RECORD:**

1 **PLEASE TAKE NOTICE** that on January 14, 2013 at 10:00 a.m. or as
2 soon thereafter as the matter may be heard in Courtroom 5 of the above-entitled
3 court, located at 280 South 1st Street, 4th Floor, San Jose, CA 95113, Defendant
4 Ocwen Loan Servicing, LLC ("Defendant") will and hereby does move this Court
5 to dismiss the Plaintiff's Complaint against Defendant.

6 The Motion is brought pursuant to Federal Rules of Civil Procedure, Rule
7 12(b)(6) on the grounds that the entire Complaint and each purported cause of
8 action contained therein fails to state a claim upon which relief can be granted
9 against Defendant.

10 This Motion is based on this Notice of Motion, the attached Memorandum
11 of Points and Authorities, the Request for Judicial Notice, the pleadings and
12 records on file herein and upon such oral and documentary evidence as may be
13 presented by the parties at the hearing.

14
15 Dated: November 26, 2013

HOUSER & ALLISON
A Professional Corporation

17 /s/ Amy E. Starrett

18 Amy E. Starrett
19 Attorney for Defendant Ocwen Loan
20 Servicing, LLC
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Nicole Sandoval ("Plaintiff") has filed suit against her loan
4 servicer, Ocwen Loan Servicing LLC ("Ocwen" or "Defendant"), alleging
5 that Ocwen breached a promise to delay the foreclosure sale until November
6 18, 2013. Related to that breach, Plaintiff alleges various violations of the
7 Homeowner's Bill of Rights ("HBOR"), and other related causes of action.

8 The Complaint fails in its entirety as there has been no foreclosure
9 sale. In fact, there has not been a Notice of Sale or Notice of Default
10 recorded in the official records of Contra Costa County in the past year
11 related to the subject loan. The provisions of the HBOR and the other
12 causes of action which all depend on the recordation of a Notice of Default
13 and the trustee's sale actually occurring, fail, and the Complaint is properly
14 dismissed as there are no grounds for Plaintiff to bring this litigation.

15 **II. SUMMARY OF FACTS**

16 On September 29, 2006, Plaintiff and Marino Sandoval ("Borrowers")
17 obtained a loan in the amount of \$2,000,000.00, which loan was secured by
18 a Note and Deed of Trust recorded against the property located at 5910
19 Bruce Drive, Pleasanton, CA 94588 ("Property"). *See* Deed of Trust
20 attached as Exhibit 1 to Request for Judicial Notice ("RJN").

21 The Borrowers then fell behind in their payments, and as a result, the
22 Borrowers were offered and accepted a loan modification agreement dated
23 October 1, 2009. *See* Loan Modification, RJN, Exhibit 2.

24 Borrowers thereafter again fell behind in their payments, being in
25 default \$28,821.76 as of January 10, 2011. *See* Notice of Default and
26 Election to Sell Under Deed of Trust, RJN, Exhibit 3. The Deed of Trust
27 was then assigned to Deutsche Bank National Trust Company, as Trustee for
28

1 American Home Mortgage Assets Trust 2006-6, Mortgage-Backed Pass-
2 Through Certificates Series 2006-6 (“Deutsche Bank, as Trustee”), with the
3 assignment being recorded in the Official Records of Contra Costa County
4 Recorder’s Office on May 13, 2011. *See* Assignment of Deed of Trust, RJN,
5 Exhibit 4. Deutsche Bank, as Trustee then substituted Power Default
6 Services, Inc. as trustee, with the Substitution recorded on May 13, 2011 in
7 the Official Records of Contra Costa County Recorder’s Office. *See*
8 Substitution of Trustee, RJN, Exhibit 5. A Notice of Trustee’s Sale was also
9 recorded in the Official Records of Contra Costa County Recorder’s Office
10 on May 13, 2011, which set a sale date of June 2, 2011 *See* RJN, Exhibit 6.

11 Then, on or around May 31, 2011 Borrowers tendered a certified
12 check in the amount of \$58,877.57, preventing the sale, and causing a Notice
13 of Rescission of Notice of Default and Election to Sell Under Deed of Trust
14 to be recorded on June 28, 2011 in the Official Records of Contra Costa
15 County Recorder’s Office. *See* RJN, Exhibit 7.

16 In April of 2012 Borrowers once again fell in default of their
17 payments, and the default remains. However, contrary to the allegations
18 made in the Plaintiff’s Complaint, there has been no Notice of Default
19 recorded in the Official Records of Contra Costa County Recorder’s Office,
20 let alone a Notice of Sale setting a sale date, or a sale actually occurring.
21 This is evidenced by a document search of recorded documents with the
22 name of Plaintiff, Nicole Sandoval, in the Contra Costa County Recorder’s
23 Office, which search is publicly available on the CRIis website at
24 http://www.criis.com/webtemp/50.20.50.34/name_list_vc.html. (last visited
25 November 22, 2013.) *See* RJN, Exhibit 8.

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1 **III. LEGAL STANDARD**

2 Federal Rules of Civil Procedure, Rule 12(b) reads in relevant
3 part:

4 Every defense, in law or fact, to a claim for relief in. any
5 pleading, whether a claim, counterclaim, cross-claim, or third-
6 party claim, shall be asserted in the responsive pleading thereto
7 if one is required, except that the following defenses may at the
option of the pleader be 'made by motion...

8 (6) failure to state a claim upon which relief can be
9 granted,... A motion making any of these defenses
10 shall be made before pleading if a further pleading
is permitted.

11 A Rule 12(b)(6) motion is similar to the common law general
12 demurrer: *i.e.*, it tests the legal sufficiency of the claims stated in the
13 complaint. The court must decide whether the facts alleged, if true, would
14 entitle plaintiff to some form of legal remedy. *Beliveau v. Caras* (C.D.Cal.
15 1995) 873 F.Supp. 1393, 1395. Rule 12(b)(6) may be used to dismiss
16 claims where alleged facts do not give rise to a legal remedy. *Ballistreri v.*
17 *Pacifica Police Dep't* (9th Cir. 1990) 90 F.2d 696, 699 A complaint must
18 be dismissed if it does not plead "enough facts to state a claim for relief
19 that is plausible on its face." *Bell Atl. Corp. v. Twombly* (2007) 550 U.S.
20 544, 570. Based on the arguments more fully explained below, Plaintiff's
21 Complaint does not allege facts sufficient to state a claim upon which
22 relief can be granted against Ocwen.

23 **IV. ARGUMENT**

24 **A. Plaintiff's Entire Complaint Fails Because There Has Been** 25 **No Notice Of Default And No Sale Of The Property**

26 Each of Plaintiff's causes of action is dependent on either a Notice of
27 Default being recorded in the Official Records of Contra Costa County, or
28

1 the foreclosure of the Property occurring before November 18, 2013. As
2 RJN Exhibit 8 evidences, there has been no recorded Notice of Default
3 recorded in the official records of Contra Costa County since January 10,
4 2011 (RJN, Exhibit 3), and that Notice of Default was rescinded in June of
5 2011 (RJN, Exhibit 7). Likewise, there has been no Notice of Sale recorded
6 since May 13, 2011 (RJN, Exhibit 6), and as a Notice of Sale cannot
7 continue a sale for more than one calendar year, there is no active Notice of
8 Sale. As there is no active Notice of Default or Notice of Sale, there
9 certainly has not been a foreclosure sale. As seen in the record, no Trustee's
10 Deed Upon Sale evidencing a sale has been recorded, because there has been
11 no sale (RJN, Exhibit 8). A foreclosure sale did not occur before November
12 18, 2013, or at any time before the filing of this motion.

13 The grounds for the Plaintiff's accusations are unknown, and why she
14 has filed this frivolous lawsuit is a complete mystery. As there has been no
15 Notice of Default, Notice of Sale, or foreclosure sale, the Motion to Dismiss
16 the entire Complaint is properly granted without leave to amend.

17 **B. Plaintiff's Complaint Fails Because She Has Not and**
18 **Cannot Allege Tender Of The Loan Amount**

19 There is a maxim in the context of foreclosures known as the "tender
20 rule." In accordance with California *Civil Code* section 1493, a valid tender
21 must be an unconditional offer of performance, made in good faith and in
22 such a manner as is most likely to benefit the creditor. The offer must be
23 made by a person able and willing to perform. California *Civil Code* section
24 1495. Plaintiff's claims herein, all of which attack foreclosure proceedings
25 (proceedings which in actuality, have never even occurred, RJN, Exhibit 8),
26 nonetheless fail as a matter of law because she failed to tender the loan
27 amount (and cannot allege that she did so).

1 Before a party can maintain any cause of action attacking a
2 foreclosure sale, she must make a real offer or actually pay the entire loan
3 amount prior to the sale. *U.S. Cold Storage v. Great Western Savings and*
4 *Loan Assoc.* (1985) 165 Cal.App.3d 1214, 1225. Any cause of action
5 implicitly integrated with the irregular sale fails unless the challenger can
6 allege and establish a valid tender. *Arnolds Management Corp. v. Eishen*
7 (1984) 158 Cal.App.3d 575, 579. It is a borrower's (like Plaintiff herein)
8 responsibility to make an unambiguous tender of the entire amount due or
9 else suffer the consequences that the tender is of no effect. *Nguyen v.*
10 *Calhoun* (2003) 105 Cal.App.4th 428, 439. "Without an allegation of such
11 tender in the complaint that attacks the validity of the sale, the
12 complaint does not state a cause of action." Miller & Starr, California Real
13 Estate (3d ed.), Deeds of Trust, section 10:212, pp. 653-54. "The rationale
14 behind this rule is that if plaintiffs could not have redeemed the property [i.e.
15 paid the full loan amount] had the sale procedures been proper, any
16 irregularities in the sale did not result in damages to the plaintiff." *SPCI RE-*
17 *HAB 01 v. E & G Investments, Ltd.* (1989) 207 Cal.App.3d 1018, 1022.
18 "The rules which govern tenders are strict and are strictly applied." *Saldade*
19 *v. Wilshire Credit Corp.* (9th Cir. 2010) 686 F.Supp.2d 1051, 1060-1061
20 (citing *Nguyen v. Calhoun* (2003) 105 Cal.App.4th 428, 439; and *Gaffney v.*
21 *Downey Savings and Loan Assn.* (1988) 200 Cal.App.3d 1154, 1165).

22 Here, even IF a Notice of Default, Notice of Sale, and foreclosure sale
23 had actually occurred (they have not), Plaintiff does not allege tender, nor
24 can she (as she did not tender the loan amount). Without such payment or
25 tender, Plaintiff is unable to challenge whatever foreclosure she mistakenly
26 believes occurred. No matter what irregularities Plaintiff may allege, it is
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1 undisputed that a full, valid, and viable tender of the indebtedness owed is
2 required before the Court can even entertain any of the instant causes of
3 action. *U.S. Cold Storage v. Great Western Savings and Loan Assoc.* (1985)
4 165 Cal.App.3d 1214, 1225. Accordingly, Plaintiff's claims challenging the
5 non-existent foreclosure are barred as a matter of law pursuant to the tender
6 rule even if the foreclosure did actually occur, and even if the claims could
7 be stated on other particulars (which they cannot; as detailed herein). As
8 such, Defendant's Motion to Dismiss should be sustained without leave to
9 amend.

10 C. **Plaintiff's First Cause Of Action For Fraud Fails Because**
11 **It Is Not Pled With The Required Specificity**

12 To plead fraud, Plaintiff must, with **factual specificity**, show: (1) the
13 defendant represented to the plaintiff that an important fact was true; (2) that
14 representation was false; (3) the defendant knew that the representation was
15 false when the defendant made it, or the defendant made the representation
16 recklessly and without regard for its truth; (4) the defendant intended that the
17 plaintiff rely on the representation; (5) the plaintiff reasonably relied on the
18 representation; (6) the plaintiff was harmed; and, (7) the plaintiff's reliance
19 on the defendant's representation was a substantial factor in causing that
20 harm to the plaintiff. Each element in a cause of action for fraud must be
21 factually and specifically alleged. *Buckland v. Threshold Enterprises, Ltd.*
22 (2007) 155 Cal.App.4th 798, 807.

23 There is a **heightened pleading requirement** when asserting fraud
24 against a corporation (such as Defendant), such that plaintiff must also
25 specifically allege the names of the persons, their authority to speak, to
26 whom they spoke, what they said or wrote, and when it was said or written.
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1 *Tarmann v. State Farm Mutual Automobile Ins. Co.* (1991) 2 Cal.App.4th
2 153, 157; *Stansfield v. Starkey* (1990) 220 Cal.App.3d 59, 73 (Pleading a
3 cause of action for fraud requires specific allegations of the what, who,
4 where, by whom, to whom, and by what means the alleged
5 misrepresentations or concealments were made.); see also *Committee on*
6 *Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197,
7 216-217 (every element of fraud must be alleged "factually and specifically"
8 and give the defendant notice of "definite charges which can be intelligently
9 met").

10 Even assuming arguendo that the foreclosure sale did occur (which it
11 did not as discussed above), Plaintiff's Complaint fails to specifically state
12 any facts supporting any alleged fraudulent conduct of Defendant. In her
13 Complaint, Plaintiff alleges that "Defendant," generally, agreed that the
14 foreclosure sale would be postponed until November 2013. (Complaint, Par.
15 30). Plaintiff fails to identify which Defendant or Defendants she is
16 referring to. Further, generally alleging "Defendant" is insufficient to satisfy
17 the heightened pleading requirements for fraud. Plaintiff fails to allege the
18 specific names of person(s) with whom she interacted, his or her authority to
19 speak/act on behalf of the Defendant, to whom they spoke, what was
20 specifically said or written, and when it was said or written. *Tarmann*,
21 *supra*, 2 Cal.App.4th at 157. This information is imperative for identifying
22 the context, qualifications or conditions of any allegedly false or misleading
23 statement or conduct. Accordingly, Plaintiff fails to show "how, when,
24 where, to whom, and by what means" the misrepresentations or
25 concealments were made as to any Defendant. For these reasons alone,
26 Plaintiff's fraud claims should be dismissed without leave to amend.
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D. Plaintiff's Second Cause Of Action For Negligent Misrepresentation Fails As A Matter Of Law

A negligence claim must plead the following: (1) a legal duty to use due care, (2) breach of that duty, and (3) the breach is the proximate or legal cause of the resulting injury. *Ladd v. County of San Mateo* (1996) 12 Cal.4th 913, 917. The question of the existence of a legal duty of care presents a question of law which is determined by the courts alone. *First Interstate Bank of Ariz., N.A. v. Murphy, Weir & Butler* (9th Cir. 2000) 210 F.3d 983, 987. The existence of a duty of care owed by defendant is prerequisite to stating any negligence claim. *Nymark v. Heart Fed. Savings & Loan Assn.* (1991) 231 Cal.App.3d 1089, 1095.

Negligent misrepresentation also requires the following elements: "(1) the misrepresentation of a past or existing material fact, (2) without reasonable ground for believing it to be true, (3) with intent to induce another's reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage." *Nat'l Union Fire Ins. Co. v. Cambridge Integrated Servs. Group, Inc.* (2009) 171 Cal.App.4th 35, 50.

The negligent misrepresentation cause of action fails first because Ocwen did not owe a legal duty to Plaintiff. Responsibility for negligent misrepresentation rests upon the existence of a legal duty, imposed by contract, statute or otherwise, owed by a defendant to the injured person. The determination of whether a duty exists is primarily a question of law. *Eddy v. Sharp* (1988) 199 Cal.App.3d 858, 864. In California, "as a general rule, a financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role a mere lender of money. *Nymark* at 1095. It has long

1 been regarded as “axiomatic that the relationship between a bank and its
2 depositor arising out of a general deposit is that of a debtor and creditor.”
3 (Citation omitted). “A debt is not a trust and there is not a fiduciary relation
4 between debtor and creditor as such.” (Citation omitted). “[T]he
5 relationship between a lending institution and its borrower-client is not
6 fiduciary in nature.” *Nymark* at 1093 fn1. The same principle should apply
7 with even greater clarity to the relationship between a bank and its loan
8 customers. *Price v. Wells Fargo Bank* (1989) 213 Cal.App.3d 465, 476;
9 *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979; *Chazen v.*
10 *Centennial Bank* (1998) 61 Cal.App.4th 532, 537. The rule as articulated in
11 *Nymark* has also been extended to loan servicers such as Defendant Ocwen.
12 *See, e.g., Marks v. Ocwen Loan Servicing* (N.D.Cal. 2009) WL 975792, *7
13 (“[A] loan servicer does not owe a fiduciary duty to a borrower beyond the
14 duties set forth in the loan contract.”); see also *De Los Santos v. World*
15 *Capital Financial*, 2009 WL 649163, *4 (C.D.Cal. 2009) (“Plaintiff has
16 failed to demonstrate that defendant, as servicer of her loan, owed a
17 fiduciary duty to her.”). A loan modification does not fall outside a lender
18 or loan servicer’s conventional role as a lender or loan servicer. *Id.*; see also
19 *Hendrickson v. Popular Mortgage Servicing, Inc.* (N.D.Cal. 2009) WL
20 1455491, at *7.

21 Here, Plaintiff alleges that Ocwen was negligent regarding
22 communications pertaining to the delay of the foreclosure sale during
23 evaluation of Plaintiff for a further loan modification. (Complaint, Par. 38).
24 The claim however is barred because Ocwen does not owe Plaintiff a legal
25 duty of care. Plaintiff does not allege that Ocwen exceeded its conventional
26 role as servicer of the Subject Loan. (See Complaint, generally). Defendant
27 Ocwen had no obligation to facilitate modification so that the loan payments
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1 could be again reduced after the 2009 modification that Plaintiff has
2 breached the terms of, and there is nothing claiming that Plaintiff's financial
3 situation had changed meriting evaluating Plaintiff for another modification.
4 Because neither a fiduciary duty nor a legal duty of care applies to lenders or
5 creditors under California law, Plaintiff has failed to identify any duty owed
6 which could support this claim.

7 Further, "negligent misrepresentation" is a form of deceit, the
8 elements of which consist of (1) a misrepresentation of a past or existing
9 material fact, (2) without reasonable grounds for believing it to be true, (3)
10 with intent to induce another's reliance on the fact misrepresented, (4)
11 ignorance of the truth and justifiable reliance thereon by the party to whom
12 the misrepresentation was directed, and (5) damages." *Fox v. Pollack* (1986)
13 181 Cal.App.3d 954, 962. *Apollo Capital Fund, LLC v. Roth Capital*
14 *Partners, LLC* (2007) 158 Cal.App.4th 226; California *Civil Code* sections
15 1709-1710. Here, notwithstanding the fact that Defendant owed no duty to
16 Plaintiff, Plaintiff has failed to allege the specific facts to support a claim for
17 misrepresentation made by Defendant (*see* argument in section C [re. Fraud]
18 above).

19 For each of these reasons, Plaintiff's negligent misrepresentation cause
20 of action is properly dismissed without leave to amend.

21 **E. Plaintiff's Third Cause Of Action For Violations Of The**
22 **Homeowner's Bill Of Rights Fails**

23 Plaintiff's third cause of action is based on purported violations of the
24 Homeowner's Bill of Rights ("HOBR"). This cause of action fails for
25 several reasons. First and as discussed above, there has been no Notice of
26 Default, Notice of Sale, or Trustee's Deed Upon Sale recorded in the
27 Official Records of Contra Costa County post January 1, 2013 (RJN,
28

1 Exhibit 8). As such, there can be no violations of the HBOR which are all
2 dependent on one or all of these actions occurring.

3 Second, the HOBR was not enacted until January 1, 2013. HOBR is
4 not expressly retroactive and is inapplicable to the Notice of Default, Notice
5 of Sale, Assignment of Deed of Trust, and Substitution of Trustee recorded
6 in the Official Records of Contra Costa County Recorder's Office well prior
7 to January 1, 2013 enactment date (RJN, Exhibits 3-6). Furthermore, that
8 Notice of Default was rescinded on June 28, 2011(RJN, Exhibit 7).

9 Third, the cause of action is merely a listing of HOBR statutes.
10 There are no allegations whatsoever as to any events, dates, or details of the
11 purported wrong doing by Defendant. No cause of action is stated. Listing
12 a statute is not a cause of action.

13 Fourth and notwithstanding the above, the claims fail because
14 Plaintiff does not occupy the Property. Pursuant to *Civil Code* section
15 2924.15, *Civil Code* sections "2923.5, 2923.55, 2923.6, 2923.7, 2924.9,
16 2924.10, 2924.11, and 2924.18 shall apply only to first lien mortgages or
17 deeds of trust that are secured by owner-occupied residential real
18 property..." This Property is not owner occupied, but rather is used as a
19 rental. This is evidenced by the Plaintiff's Application to Proceed in Forma
20 Pauperis filed in this action on October 17, 2013, in which Plaintiff declares
21 under penalty of perjury that she pays "Rent" at \$550.00 per month.
22 (Application, Pg. 3, Section 8). As Plaintiff owns the Property, she would
23 not be paying "rent" if she resided there, and this is further consistent with
24 Defendants records which show that Plaintiff has provided copies of rental
25 agreements for the persons renting the Property. Accordingly, Defendant
26 was not required to comply with *Civil Code* sections 2923.55, 2923.7,
27 2924.9, 2924.10, and 2924.18 and there can be no stated violation of these
28

1 sections.

2 Fifth, *Civil Code* section 2924.9 does not apply if a borrower has
3 previously exhausted the first lien loan modification process as described in
4 *Civil Code* section 2923.6, which provides that a notice of default or notice
5 of sale can be recorded if the borrower has previously accepted a written
6 modification which they then defaulted on. Here, Plaintiff must at minimum
7 plead that she has not already been provided a loan modification. Plaintiff
8 cannot and did not plead such because she has in fact already received a
9 modification (RJN, Exhibit 2). Thus, a cause of action regarding a purported
10 violation *Civil Code* section 2924.9 has not, and cannot, be properly pled.

11 Finally, *Civil Code* section 2924.18 requires that a borrower submit a
12 complete application for a first lien modification before the section would
13 become applicable. Therefore, for this provision to apply, Plaintiff must
14 plead, at the most fundamental level, that she submitted a complete loan
15 modification application to Defendant as the servicer of the loan, and the
16 relevant dates of such submission. Plaintiff has not done that.

17 For all of the forgoing reasons, Defendant's Motion to Dismiss the
18 third cause of action is properly granted without leave to amend.

19 **F. A Claim Is Not Stated Under Section 2923.5**

20 Plaintiff's fourth cause of action alleges a violation of *Civil Code*
21 section 2923.5, which requires a statement in the notice of default
22 confirming that the mortgagee, trustee, beneficiary, or authorized agent
23 contacted the borrower to discuss financial options or alternatives prior to
24 recording the notice, unless the party is exempted from these requirements
25 as stated in the notice.

26 Again, this cause of action completely fails because there is no active
27 Notice of Default recorded in the Official Records of Contra Costa County,
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1 a prerequisite to the application of this code section.

2 Furthermore, even if there was an active Notice of Default recorded
3 in the Official Records of Contra Costa County, *Civil Code* section 2923.5
4 does not apply because the Plaintiff does not occupy the Property, as
5 discussed above.

6 Finally, again assuming arguendo that the Notice of Default existed,
7 the Plaintiff lived at the Property, and the sale actually occurred as the
8 Complaint curiously alleges, the cause of action still fails because the “only
9 available remedy under Section 2923.5 is a postponement of the sale before
10 it happens.” *Mabry v. Superior Court* (2010) 185 Cal.App.4th 208, 214-
11 215. As the Complaint alleges the sale occurred, there would be no remedy
12 available for this purported violation and the Complaint improperly seeks
13 damages under this claim, which cannot be had (Complaint, Par. 52).

14 **G. Plaintiff's Causes Of Action For Breach Of Contract And**
15 **Promissory Estoppel Fail**

16 Plaintiff alleges that Defendant made an oral promise to Plaintiff that
17 it would not proceed to foreclose before November 18, 2013 while it
18 processed a loan modification. (See Complaint, Par.'s 54-55 and 60) First,
19 there can be no breach or promise relied upon because there has been no
20 foreclosure sale (RJN, Exhibit 8). In fact, it is the Plaintiff who is in breach
21 of this purported “contract” because per the terms alleged by Plaintiff,
22 Plaintiff's consideration for the postponement of the foreclosure sale was
23 that “Plaintiff would not file a civil lawsuit, seek injunctive relief through
24 the civil or bankruptcy courts.” (Complaint, Par. 55). This civil lawsuit,
25 which also seeks injunctive relief, was filed on October 17, 2013. As there
26 has been no foreclosure sale, it is the Plaintiff that is in breach of this
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1 purported agreement by filing this frivolous lawsuit, and it is the Plaintiff
2 who is liable to Defendant for damages.

3 Next, assuming arguendo that the foreclosure sale did occur, both
4 causes of action fail because of the Statute of Frauds. In California, a loan
5 agreement must be in writing to satisfy the statute of frauds. *Civil Code*
6 sections 1623(a)(3), 1624, 1698(a), 2922. "An agreement to modify a
7 contract that is subject to the statute of frauds is also subject to the statute of
8 frauds." *Seacrest v. Security Nat'l Mortg. Loan Trust 2002-2* (2008) 167
9 Cal.App.4th 544, 553. Here, the deed of trust provides the lender with the
10 right to foreclose on the Property. An agreement to forego foreclosure,
11 while a loan modification is being considered, therefore, proposes to modify
12 the deed of trust. Because the alleged oral contract involves a loan
13 agreement, it is unenforceable because it is subject to the statute of frauds.
14 Thus, the alleged oral agreement is barred by the statute of frauds because it
15 was never reduced to writing. An agreement to postpone a valid sale of
16 property beyond the date when said property may be sold under and
17 according to the terms of the trust deed is an agreement to alter the terms of
18 the instrument. To hold otherwise would reduce a trust deed in any case to
19 an unsubstantial if not worthless security. *Karlsen v. Am. Sav. & Loan Assn.*
20 (1971) 15 Cal.App.3d 112, 121, citing *Stafford v. Clinard* (1948) 87
21 Cal.App.2d 480, 481.

22 Therefore, the promise comes under the Statute of Frauds. The
23 promise still requires a writing to be enforceable. Plaintiff admits in that
24 there was no written contract (Complaint, Par. 57). Accordingly, the fifth
25 and sixth causes of action are both barred by the statute of frauds.
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1 Finally, a cause of action for breach of contract is comprised of the
2 following elements: (1) the contract; (2) plaintiff's performance or excuse for
3 non-performance; (3) defendant's breach; and (4) the resulting damages to
4 plaintiff. *Reichert v. General Ins. Co.* (1968) 68 Cal.2d 822, 830. Here,
5 Plaintiff's allegations fail to allege when the contract was made, with whom
6 and under what specific terms. As such, the cause of action should be
7 dismissed. *See Grill v. BAC Home Loans Servicing, LP* (E.D.Cal. 2011) WL
8 127891, at *4, fn. 3 (dismissing a claim for breach of oral contract where the
9 complaint did not set forth any facts relating to when, with whom and under
10 what terms the contract was made).

11 Similarly, no promissory estoppel cause of action can succeed, where
12 no clear and unambiguous promise is made. "The elements of a promissory
13 estoppel claim are '(1) a promise clear and unambiguous in its terms; (2)
14 reliance by the party to whom the promise is made; (3)[the] reliance must be
15 both reasonable and foreseeable; and (4) the party asserting the estoppel
16 must be injured by his reliance.'" *US Ecology, Inc. v. State of California*,
17 (2005) 129 Cal.App.4th 887, 901. "[A] promise is an indispensable element
18 of the doctrine of promissory estoppel." *Garcia v. World Sav., FSB* (2010)
19 183 Cal.App.4th 1031, 1044. Estoppel cannot be established from
20 preliminary discussions and negotiations. *National Dollar Stores v. Wagon*
21 (1950) 97 Cal.App.2d 915, 919. Plaintiff has not alleged a clear and
22 unambiguous promise and her cause of action for promissory estoppel fails.

23 Based on all of the above, Plaintiff's fifth and sixth causes of action
24 are properly dismissed without leave to amend.

25 //

26 //

1 **H. Plaintiff's Cause of Action For "Injunctive Relief" Is Not A**
 2 **Claim**

3 Plaintiff's Injunctive Relief claim fails because it is not an actual
 4 cause of action. "Injunctive Relief is a remedy and not, in itself, a cause of
 5 action, and a cause of action must exist before injunctive relief may be
 6 granted." *Shell Oil Co. v. Richter* (1942) 52 Cal.App.2d 164, 168.
 7 Furthermore, an injunction cannot be issued unless the applicant has
 8 satisfied the Court that equity requires the use of this extraordinary remedy.
 9 *See Tiburon v. Northwestern P.R. Co.* (1970) 4 Cal.App.3d 160, 179.
 10 Plaintiffs bear the burden of showing that she is likely to succeed on the
 11 merits of the claims. *Winter v. National Resources Defense Council, Inc.*
 12 (2008) 129 S.Ct. 365, 374. Here, Plaintiff has not shown any likelihood to
 13 succeed on the merits of her claims. As established above, there has been no
 14 foreclosure sale, and a Notice of Default has not been recorded in the
 15 Official Records of Contra Costa County. In addition, even assuming
 16 arguendo that the foreclosure had occurred, Plaintiff has failed to sufficiently
 17 state any cause of action, has failed to tender, and has not (and cannot) make
 18 a sufficiently strong showing of likelihood of success on the merits.
 19 Because Plaintiff's other claims fail, so must her claim for injunctive relief.

20 **I. Plaintiff Failed To Name An Indispensible Party**

21 Plaintiff Nicole Sandoval failed to name an indispensable party, her
 22 husband, Marino Sandoval, as a party to the instant suit. *Federal Rule of*
 23 *Civil Procedure* ("F.R.C.P") 19 provides for the required joinder of parties
 24 traditionally noted as necessary or indispensable. A party is indispensable
 25 based on a consideration of factors, such as if their joinder is required for a
 26 just adjudication, the absent party has an interest in the subject matter which
 27 is implicated or impaired, the party's interests are such that in his or her
 28

1 absence complete relief cannot be accorded among those already parties,
2 and/or the defendant will be prejudiced or faced with multiple inconsistent
3 obligations or lawsuits. *General Refractories Co. v. First State Ins. Co.* (3rd
4 Cir. 2007) 500 F.3d 306, 319; F.R.C.P. 19(b); *and see*, F.R.C.P. 19(a) Adv.
5 Comm. Notes to 1966 Amendment (Plaintiff is required to join “all persons
6 who are materially interested in the subject matter of the case and who are
7 needed for just adjudication.”). An indispensable party under Rule 19(b)
8 must be joined otherwise the suit must be dismissed. *See, Disabled Rights*
9 *Action Committee v. Las Vegas Events, Inc.* (9th Cir. 2004) 375 F.3d 861,
10 867, fn. 5; *Republic of Phillipines v. Pimental* (2008) 553 U.S. 851, 856, 128
11 S.Ct. 2180, 2184.

12 Here, Plaintiff’s husband, Marino Sandoval, is a co-obligor under the
13 subject loan with Plaintiff (RJN, Exhibit 1). As a co-borrower under the
14 Subject Loan with Plaintiff, Marino Sandoval’s interests in the subject loan
15 are exactly the same as Plaintiff’s, and as a co-owner of the Subject
16 Property, the results of this case would certainly affect the Property and his
17 interests in the Property. *Bank of California Nat. Ass’n v. Superior Court in*
18 *and for City and County of San Francisco* (1940) 16 Cal.2d 516, 521-522
19 (The court found that “necessary” or “indispensable” parties are those
20 “persons whose interests, rights, or duties will inevitably be affected by any
21 decree which can be rendered in the action.” “An attempt to adjudicate their
22 rights without joinder is futile.” *Vanoni v. County of Sonoma* (1974) 40
23 Cal.App.3d 743, 746. Moreover, joinder of Marino Sandoval, as a co-
24 obligor and co-owner of the Property is necessary, because his absence in
25 this lawsuit could subject Defendant to multiple or inconsistent liability (i.e.
26 Defendant foresees judgment being entered in their favor in this case, and
27 then Plaintiff’s husband filing and prosecuting his own separate lawsuit that
28

1 mirrors that of his wife's/co-borrower's case herein). Essentially, Plaintiff
2 and her husband would get two bites at the apple in this litigation.

3 As such, Marino Sandoval is an indispensable party, and Marino
4 Sandoval's presence as a plaintiff in this case is necessary in order to grant
5 complete relief to the parties herein. Accordingly, this case should be
6 dismissed.

7 **V. CONCLUSION**

8 Plaintiff fails to plead facts sufficient to state any cause of action
9 against Defendant Ocwen, and cannot do so because there has been no
10 foreclosure sale, and there is no Notice of Default recorded in the Official
11 Records of Contra Costa County. In addition, Plaintiff fails to offer to
12 tender which is fatal to each of her claims, and each cause of action is not
13 properly stated. Finally, Plaintiff has failed to name an indispensable party.
14 As such, Defendant respectfully requests the Motion to Dismiss be granted
15 with prejudice.

16
17 Dated: November 26, 2013

HOUSER & ALLISON
A Professional Corporation

18
19 /s/ Amy E. Starrett
20 Amy E. Starrett
21 Attorney for Defendant Ocwen Loan
22 Servicing, LLC
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PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss
COUNTY OF ORANGE)

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 9970 Research Drive, Irvine, CA 92618.

On November 26, 2013, I served the following document(s):

**DEFENDANTS NOTICE OF MOTION AND MOTION TO DISMISS;
MEMORANDUM OF POINTS AND AUTHORITIES**

On the following interested parties in this action described as follows:

Edward Robert Ramirez
Ramirez & Associates
1910 Trade Zone Boulevard
San Jose, CA 95131
Email: err@ramirezassociatesllp.com
Attorney for Plaintiff

[X] **BY ELECTRONIC MAIL:** I transmitted the document(s) listed above electronically either by e-mail or by electronic filing through the CM/ECF System to the e-mail addresses listed above. I am readily familiar with Microsoft Outlook's e-mail system and the United States District Court's CM/ECF System, and the transmission was reported as complete without error.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Executed on November 26, 2013, in Irvine, California.

/s/ Tami Krogle
Tami Krogle